TABLES OF AUTHORITIES

Cases

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 53

JAMES CLEVELAND BURGETT,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY BRIEF FOR PETITIONER

ARGUMENT

1. The unfair position taken by the State of Texas in Respondent's Brief provides the best possible proof of the necessity for a hearing on the issue of whether a prior conviction is void for denial of the right to counsel. The Supreme Court is asked to find as a matter of fact that petitioner actually waived counsel (Respondent's Brief, p. 10), although a waiver was not contended in either the trial court or the Court of Criminal Appeals or in answer to petitioner's petition. The Supreme Court is asked to make this finding of fact based on two *ex parte* affidavits signed on September 8, 1967, and filed with the Clerk of the Court of Criminal Appeals on September 11, 1967, long after the

record was certified, printed, and filed in this Court. The affidavits, although not part of the record, are offered by the State as conclusive evidence that petitioner waived his right to counsel, even though (1) petitioner's counsel was given no notice, (2) petitioner's counsel was given no opportunity to cross examine the State's witnesses, (3) petitioners was denied the right to confront the witnesses against him, (4) no hearing was held before any judge in order to ascertain the credibility of petitioner who denies that counsel was tendered to him or that he waived counsel. The State's assumption that the Supreme Court will re-open the case for original evidence, presented for the first time in respondent's brief, appears to be so contrary to the Court's practice as to require no answer at all. Under this Court's decision in *Pennsylvania ex rel Hermann* v. *Claudy*, 350 U.S. 116, 123 (1956), the affidavits have no conclusive evidentiary value.

2. The State contends for the first time that petitioner's counsel had a means of challenging the void prior convictions prior to trial. The State represents to this Court that Article 760e and Article 759a § 6 (Respondent's Brief, Appendix C and D) provide authority for this proposition. The statutes on their face do not give any support to this position. These statutes deal with formal requirements for the record on appeal to the Court of Criminal Appeals. The statutes dealing with objections to the indictment do not include a challenge to prior convictions. Vernon's Texas Code of Criminal Procedure, Articles 506, 511, 512 (1948). No cases were cited by the State. With all due deference to the expert criminal lawyers filing the brief on behalf of the State of Texas, the cases cited in Petitioner's Brief for the proposition that defendant could do nothing to prevent this information from coming to the attention of the jury remain unimpeached. The State even concedes that at the

time of petitioner's trial there was no procedure to suppress evidence (Respondent's Brief, p. 10).

The cruel irony, however, of the State's position is that the State wishes to charge petitioner's trial counsel with being negligent or ineffective for failure to invoke what they now say is a known procedure for challenging a void conviction, when the State refused to allow petitioner's counsel to see the evidence prior to trial so that he was denied even an opportunity to make an objection — except in the presence of the jury.

3. As predicted, the State did argue that petitioner shows no harm because he only received a ten year sentence in the State Penitentiary. Justification for this argument, however, comes from surprising directions.

First, it is contended for the first time that petitioner was subject to a twenty-five year automatic penalty because of Article 62, instead of Article 63 under which he was tried. (See Petitioner's Brief, Appendix A, Texas Habitual Criminal Statutes) Under Article 62, the maximum penalty is given when a prior offense is of the same character as the primary offense. For Article 62 to be applicable, the prior and the primary offense must be in substance the same offense. *E.g., Flores* v. *State,* 166 S.W. 2d 706 (Tex. Crim. App. 1942); *Long* v. *State,* 36 Tex. 6 (1871). The State concedes that the Tennessee convictions were not of the same nature as the primary offense and could not be used. The State then contends that the State conviction for burglary is an offense of the same character as assault with intent to murder. This position cannot be maintained, even if the State could induce this Court to decide that the state court trial judge erroneously ruled out the Texas burglary conviction on state law grounds.

Second, and more important, the State claims that no harm is shown because the jury knew or must have known that petitioner was being held in jail or another charge when the crime allegedly occurred. The State concludes, "Under this record, life could have been assessed." (Respondent's Brief, p. 11) This position, in addition to being untenable, is reprehensible. The State is saying that because petitioner was in jail — whether awaiting trial or after trial we do not know — the jury could consider this evidence and assess a life penalty even though a judge charged as a maximum, twenty-five years. This argument is made despite the State's own concession, in another part of the brief, that the maximum penalty which could have been assessed against petitioner was twenty-five years (Respondent's Brief, p. 4)

4. The State now contends that "The State offered to stipulate the prior convictions out of the presence of the jury, but respondent would not agree" (Respondent's Brief, p. 4). Consider the alternative that such an offer would present to petitioner: Either he stipulates to void prior convictions and serves life imprisonment on a finding of guilty, or he exercises his constitutional rights in the presence of the jury and suffers the prejudice that comes when the jury is informed of prior convictions. He is not permitted to challenge the prior convictions outside the presence of the jury; he can only admit them out of the presence of the jury. In other words, the price of an unprejudiced jury is the waiver of his constitutional rights.

CONCLUSION

The judgment of the Court of Criminal Appeals should be reversed.

Respectfully submitted,

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